

THE JUDGMENT OF THE GERMAN CONSTITUTIONAL COURT OF 5TH MAY: MANNA FROM HEAVEN OR A MERE STORM IN A TEACUP

On 5th May a storm broke out in European legal and political circles: Germany's most senior judges had dared to overrule a Judgement of the European Court of Justice. Not only had the Bundesverfassungsgericht, Germany's highest Court, had the gall to state that the European Court had exceeded its powers but it also ruled that the European Central Bank had acted beyond its mandate and in contravention of EU and German national law. The otherwise unassailable status of the European Court and the reputation as saviour of the Eurozone for which the European Bank likes to be known, were both at stake.

It is not surprising that Eurosceptics, both in the UK and elsewhere in Europe, publicly gloated at this act of defiance of a national court and welcomed the Judgment with considerable glee. But what really happened and why, and, most importantly, was the judgement truly like laying a "*bomb under the European project*" as even quality papers have suggested.

Background

The story begins with the Eurozone Crisis. The Crisis arose late in 2009 when it transpired that several Euro Zone countries were no longer able to repay their sovereign debts or to bail out their over-indebted banking institutions. In September 2012 the European Central Bank ('ECB'), offering 'unlimited support', adopted a number of monetary policy procedures on the grounds that these would provide time for the weaker Eurozone States to take important structural measures so as to be able to modernise and make their economies more efficient. In short, this policy was intended to restore some financial balance in the Eurozone. Furthermore, the ECB also assumed a number of procedures regulating the prudential supervision of credit institutions as well as macro-prudential oversight of the financial systems within the EU. As Mario Draghi, the ECB President said at the time, the ECB would do "*whatever it takes*" to save the Euro.

In this context, the ECB Governing Council decided in September 2014 to initiate an asset-backed securities purchase programme (ABSPP). In January 2015 the ECB decided that the ABSPP should be expanded to include a secondary markets public sector asset purchase programme (PSPP) confirmed by its Decision (EU) 2015/774 of 4 March 2015. Under this programme, the national central banks, in proportions reflecting their shares in the ECB's capital key, and the ECB, might, within a given time limit, purchase outright eligible marketable debt securities from eligible counterparties on the secondary markets.

A further ECB Decision followed in December 2015 whereby the time limit within which the PSPP would be operative was extended. These asset purchases, also known as 'quantitative easing' (QE), were to "*support economic growth across the Euro area and help the Eurozone return to inflation levels below, but close to 2 %*". This in the context of the ECB's monetary policy's primary objective of maintaining price stability. In 2016 and 2017 the ECB refined their original Decision even further.

Not every Eurzone country was happy with this measure. From a number of quarters – political, banking, economic and legal – came warnings signs of the far reaching nature the PSPP as operated would have and of the direct influence the ECB's policy might exercise over the countries' own fiscal policies.

In 2014 a number of prominent German individuals issued a constitutional action – referred to as the 'OMT Case' - before the Bundesverfassungsgericht ('BvFG'), the Federal Constitutional Court of Germany, located in Karlsruhe. This turned on the ECB's so called Outright Monetary Transactions strategy ('OMT') and its continued purchases of government bonds (BVerfG Case No 2 BvR 2728

(January 2014). The BvFG gave its reasoned judgement in this case in June 2016. Nevertheless, the OMT Case is not to be mistaken for the ‘Gauweiler Judgement’ which gave rise to the legal storm at the centre of this story and which we will now discuss.

The Gauweiler Actions

In June 2015, concerned about the monetary effects of the PSPP on German society as a whole and in particular on its democratic basis laid down in das Grundgesetz (the German ‘Constitution’), largely the same group of litigants as in the OMT case, brought joined constitutional actions before the BvFG to test the ECB’s Decision EU 2015/774 of March 2015 (*Peter Gauweiler and others v Deutsche Bundestag* (C-62/14 (EU: C: 2015)).

The proceedings which were brought against the German Government (the ‘Bundesregierung’ and the Second Chamber of the Federal Parliament (‘the Bundestag’) as Defendants concerned the participation of the German Central Bank (the ‘Bundesbank’) in the ‘implementation of the ECB Decision in question and, the alleged failure of the Bundestag and the Bundesregierung to act in respect of that participation.

It was alleged that the PSPP violated the prohibition of monetary financing and was *ultra vires* (an act which requires legal authority but which is done without it) violating as it did the *principle of conferral* which indicates that the EU Member States have the right to deal with all matters that fall outside the agreements of the EU Treaties and that the EU can only act within the conferred competences defined by the Member States in the Treaties. It was also argued that the decisions were in fact *anti-democratic*, because they undermined the German constitutional identity by their encroachment upon the competences of the German state, as laid down in the Constitution (the ‘Grundgesetz’).

The Referral to the CJEU for a ‘Preliminary Ruling’ by THE BVFG

By Order of 18th July 2017, the Second Senate of the BvFG stayed the Gauweiler actions and referred a number of questions which had arisen during the proceedings for a Preliminary Ruling under Article 267 of the TFEU (The Treaty on the Functioning of the EU) to the *European Court of Justice* (CJEU) (*Case C-493/17*).

If a national court is in doubt about the interpretation of European law it can ask the CJEU for a Preliminary Ruling, i.e. interpretation and clarification. A Preliminary Ruling is binding on the national court which has requested it but not on the courts of other EU Member States.

It was the first time ever that the BvFG made a reference under Article 267 TFEU to the CJEU, and, both for that reason and for its content, the request drew considerable attention.

In it the BvFG asked the CJEU to determine the validity of ECB Decision 2015/774 and its subsequent decisions and the applicability of the PSPP in a Member State, on the premise that the PSPP exceeded the ECB’s monetary policy mandate on account of the external monetary policy practised by the Member States, and the immediate economic effects flowing from it in the Member States. It was also asked to rule on the issue of whether the ECB had sufficiently assessed or substantiated the measures provided for in its Decisions and whether their assessment had satisfied the *principle of proportionality*. The proportionality principle means that to achieve its aims, the EU will only take the action it needs to or no more and stay within its own competences.

The Grand Chamber of the CJEU would pronounce its judgement on 11th December 2018. We shall see, in the next instalment in this series of blogs, what its conclusions were and how the BvFG reacted.

About the Author

Reina Maria van Pallandt is a senior disputes resolution lawyer with dual British and Dutch nationality. After obtaining an LLB Honors degree in Dutch Law and Public International Law at the University of Amsterdam (UvA), Reina Maria studied International Law of the Sea at London School of Economics (LSE). She was admitted as a Solicitor of the Senior Courts of England & Wales in 1979 and of the Law Society of Ireland in 2019. Reina Maria originally practised as a solicitor at Holman, Fenwick & Willan in London and Paris and thereafter at Clifford Chance where she specialised in marine and general commercial arbitration and litigation representing shipowners, P&I Clubs, shipbuilders, repair yards and charterers such as oil and gas companies and commodity traders.

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For more information or assistance with a particular query, please in the first instance contact Adam Mikula on 020 7947 5354 or by email on adm@prospectlaw.co.uk.

Prospect Law Ltd

23 Berkeley Square, London W1J 6HE
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle
Donington, Derbyshire DE74 2TZ

 @prospectupdate
E info@prospectlaw.co.uk
www.prospectlaw.co.uk